United States Court of Appeals

for the Second Circuit

APPELLANT'S APPENDIX

75-2006 B P/S

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 75-2006

UNITED STATES OF AMERICA ex rel.
JULIUS FULLER,

Relator-Appellant,

-against-

ROBERT HENDERSON, SUPERINTENDENT,

Respondent.

On Appeal from the United States District Court
for the Southern District of New York

APPELLANT'S APPENDIX

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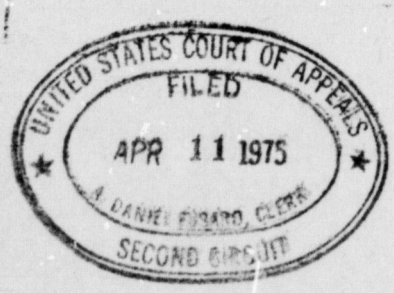

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73 8016 T-2694

Or

73 - 2292

Filed 8-29-73

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73 CV 1544

PRO SE

CIVIL DOCKET
UNITED STATES DISTRICT COURT

JUDGE CANNELLA

Jury demand date:

D. C. Form No. 106 Rev.

73 CIV. 15

TITLE OF CASE	ATTORNEYS
U.S.A. EX REL, JULKUS FULIER VS. HONORABLE ROBERT J. HENDERSON, SUPT AUBURN CORRECTIONAL FACILITY, AUBURN, N.Y. 135 State Street,. 13021	For plaintiff: JULIUS FULIER 135 State Street, Auburn, N.Y. 13021 For defendant: Louis J. Lefkowitz Attorney General State of New York Attn: Iris A. Steel 80 Centre Street New York, N.Y. 10013

STATISTICAL RECORD	COSTS			DATE	NAME OR RECEIPT NO.	REC.	
J.S. 5 mailed X	Clerk						
J.S. 6 mailed ✓	Marshal						
Basis of Action: HABEAS CORPUS.	Docket fee						
	Witness fees						
Action arose at:	Depositions						

U.S. EX REL, JULIUS FULLER, VS. HON ROBERT J. HENDERSON, ETC.

PRO SE

JUDGE CANNELLA

73 CV. 154

DATE	PROCEEDINGS	Ju
Apr10-73	Filed petition for Writ of Habeas Corpus.	
Apr10-73	Filed Order permitting the pltff to proceed in forma pauperis without prepayment of fees. Lasker, J.	
Apr30-73	Filed affidavit of Iris A. Steel in opposition to petitioner's application for habeas corpus relief.	
May14-73	Filed petitioner's answering affidavit (traverse).	
May14-73	Filed Notice of Assignment to JUDGE CANNELLA.	
Jun.15-73	Filed Relater's affidavit & notice of motion fro a sua sponte order, for a temporary restraining order.	
Jul 12-73	Filed Memorandum & Order by Cannella J. Petitioner's application for a Writ of Habeas Corpus is denied, So Ordered Cannella J. m/n	
Aug 29-73	Filed Memorandum & Order by Cannella J. Petitioner's application for a certificate of probable cause with respect to the court s denial of his petition for a Writ of Habeas Corpys is denied, So Ordered Cannella J.. m/n	
Aug 29-73	Filed Petitioners notice of appeal, from the decision dtd. 7/12/73 by Cannella J. mailed copies.	

A TRUE COPY
RAYMOND F. BURGHARDT, Clerk
By P. McAleer
Deputy Clerk

3

UNITED STATES DISTRICT COURT
SOUTHERN DISTRIC T OF NEW YORK

----------x

UNITED STATES OF AMERICA ex rel.
JULIUS FULLER,

Petitioner,

- against -

PRO SE
73 Civ. 1544

HONORABLE ROBERT J. HENDERSON,
Superintendent Auburn Correctional
Facility, 135 State Street,
Auburn, New York, 13021

Respondent.

----------x

MEMORANDUM

CANNELLA, J.

Petitioner's application for a writ of habeas corpus, made pursuant to 28 U. S. C. §2241 et seq., is denied.

The petitioner is presently incarcerated in Auburn, N. Y., following his conviction after a jury trial for the crime of manslaughter in the first degree. On November 8, 1956, he was sentenced to a term of imprisonment of 10 to 20 years. The conviction was affirmed by the New York appellate courts.

The petitioner contends that the prosecutor recommended the acceptance of a plea to a lesser charge in his case but by "contrivance" and "deceit", the presecutor reneged on the "plea bargain" and forced the petitioner to stand trial on the manslaughter charge. He further alleges that he was denied the effective assistance of counsel.

The court finds that it need not entertain the petitioner contentions on these issues since these very same arguments were raised and rejected by this court on a prior habeas corpus application.[1/] 28 U.S.C. §2244(b). With respect to the prior application, the court finds that it was the petitioner and not the prosecution who was responsible for the withdrawal of the plea due to the refusal of the sentencing judge to promise a suspended sentence. The court further found that the petitioner was represented by competent counsel. There is nothing alleged in the petitioner's present application in the nature of new facts or a change in the law which persuades the court that the ends of justice

1. 71 Civ. 4247 (S.D.N.Y. 1972).

would be served by reaching the merits of this subsequent application. See Sanders v. Usited States, 373 U. S. 1, 15 (1963); United States ex rel. Schnitzler v. Follette, 406 F.2d 319 (2d Cir.), cert. denied, 395 U. S. 926 (1969).

The petitioner further claims that his arrest was without probable cause and that he was denied the right to appear before the Grand Jury. The court finds no merit in either claim. With respect to each of these claims, there is no showing that the petitioner pursued his remedies in the state courts and exhausted available state remedies. Furthermore, the petitioner offers no facts in support of his conclusory statement that the arrest was illegal. Finally, in connection with the second claim, the petitioner had no constitutional right to appear before the Grand Jury. See United States ex rel. McCann v. Thompson 144 F.2d 604,605-606, (2d Cir.), cert. denied, 323 U. S. 790 (1944).

In view of the foregoing, the petitioner's application for a writ of habeas corpus is denied. The Clerk of the Court is directed to send a copy of this memorandum to the petitioner.

So ordered.

DAted: New York, N.Y.
July 12, 1973

John M Connell
U. S. D. J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA ex rel. JULIUS FULLER,

Petitioner,

- against - 71 Civ. 4274

R.J.HENDERSON, Superintendent of Auburn Correctional Facility, Auburn, N.Y.,

Respondent.

M E M O R A N D U M

CANNELLA, J.

The petitioner's application to reargue his application for a writ of habeas corpus is granted. However, after examining the petitioner's application on reargument, and after reconsidering the arguments raised by both the petitioner and the respondent on the habeas corpus application, the court is not persuaded that it erred in denying the writ of habeas corpus.

Therefore, the court hereby adheres to its original ruling in this matter which denied the applicant's petition for a writ of habeas corpus on May 16, 1972. The Clerk of the Court is directed to send a copy of this memorandum to the petitioner.

So ordered.

Dated: New York, N.Y.

August 8, 1972

John M. Cannella
U. S. D. J.

UNITED STATES DIS. .CT COURT
SOUTHERN DISTRICT OF NEW YORK

U.S.A. ex rel JULIUS FULLER Relator-Petitioner, - against - HONORABLE ROBERT J. HENDERSON SUPERINTENDENT AUBURN CORRECTIONAL FACILITY 135 STATE STREET, AUBURN, NY 13021 Respondents.	73 Civ. 1[illegible] 73-Civil_____ AFFIDAVIT IN SUPPORT OF AN APPLICATION FOR A WRIT OF HABEAS CORPUS PURSUANT TO TITLE 28 USCA SECTIONS 2241, 2243 and 2254, AND F.R.C.P.

State of New York
City of Auburn SS.:
Cayuga County

JULIUS FULLER in propria pefsona, first being duly sworn, deposes and says:

(1) That he is the Petitioner-Relator above captioned and respectfully submits this instant affidavit in support of the annexed Application for a Writ of Habeas Corpus.

(2) That he asserts he is presently being illegally restrained by Respondent ROBERT J. HENDERSON, Superintendent of Auburn Correctional Facility at 135 State Street, Auburn, New York 13021, upon a judgment of conviction defective procedurally inlaw and facts.

(3) That he asserts that he has diligently attempted to exhaust his available State remedies but has been repulsed by the Prosecuting Attorneys Office [illegible] whose discriminatory practices and 'actions' and'lack of actions' has now exacerbated the prejudicial conditions at the Trial Court level by totally ignoring the material fact interposed in support of the error of constitutional dimension to be reviewed on a post conviction petition.

(4) That on January 8, 1954 Petitioner was indicted in Bronx County for the crime of Manslaughter in the First degree. At the first trial the Jury was unable to reach a verdict. Thereafter, on October 21, 1954 petitioner withdrew his plea of not guilty and entered into a Plea Bargain to Assault in third deg. to cover all charges as agreed to by the Honorable William Lynch, a Bronx County Judge, for sentencing on December 7, 1954. An incredible set of circumstances "compelled a jury trial", resulting in a conviction of Manslaughter in the First degree, and a sentence of 10 to 20 years on November 8, 1956. The conviction was affirmed on appeal (9 App. Div. 2d 877 (1st Dept. 1959), Affd.8 N.Y. 2d 866 (1960)).

5. That the underlying gravamen of this application is the viable question of Constitutional dimension (that has been thoroughly exhausted in the Courts of the State of New York) which was and is responsible for two (2) tangential questions that must, of necessity, procedurally be the progeny of the prime question:

> Relator-Petitioner was denied the "Effective" assistance of counsel" as secured by the 5th, 6th and 14th Amendment (Gideon v. Wainwright, 372 U.S. 282; U.S.A. ex rel. Thomas v. Zelker, 332 F. Supp. 393(1971) THAT EVEN permeated the unconstitionally convened Grand Jury and petit jury, AND,
>
> (A) Denied the right to appear before the Grand Jury; AND,
>
> (B) No probable cause for his arrest.

6. The representation of Relator was so inadequate and ineffective that it was responsible for this Mockery of Justice that permitted the People to offer and proceed through a pleading "SCENARIO" they never intended to keep, A Fortiorari; That he respectfully asserts that County Judge Eugene G. Schultz was without jurisdiction to render the ten (10) to twenty (20) year sentence rendered on November 8, 1956, after trial, upon a conviction of Manslaughter in the First Degree.

7. That the People, though an over-ambitious prosecutor, took advantage of a juxtaposition of a pleading proceeding to deny the ~~XXXXXX~~ Petitioner the segis protections of the "(D)ue Process" and the "(E)qual Protection of the Law" Clauses of the Fourteenth Amendment. That this identical "deceit" and "contrivance" constrained a unanimous Supreme Court to scrutinize the Rudolph Santobello conviction (Santobello v. New York), 404 U.S. 257 (December 21, 1971) even though the First Judicial Department and associate Judge Adrian Burke felt constrained to "affirm, without opinion" the Bronx County Conviction.

8. However, the issue presented in this application concerns a point of law and questions of fact of FIRST IMPRESSION since the " deceit" and "contrivance" of offering an incredibly minimal 'plea bargain" - an offer even an INNOCENT MAN "could not refuse" - was the contrivance utilized by the People to subsequently secure a " perjured-plea" guilty verdict from an unsophisticated jury. 1

10. Petitioner was denied "adequate assistance of counsel" and of prepared counsel (People v. Bennett, 29 N.Y.2d 462 (February 10, 1972) for "(w)ithout it, though he may be not guilty, he faces the danger of conviction because he does not know how to establish his innocence". Gideon v. Wainwright, supra at p.792.

---

1 County Judge Eugene G. Schultz rendered the extremely "harsh" sentence of ten (10) to twenty (20) years on November 8, 1956 because of Defendant's(FULLER) "admissions" and "plea-of-guilty" which were, in fact, a "perjured plea" to a "(A)lea-Bargain" which even an "innocent man could not 'turn down'".

In reaffirming Hamilton v. Alabama 368 U.S. 52, the Court state in Gideon saliently:

"(W)e don't stop to determine whether prejudice resulted".

11. It is respectfully submitted that prejudice resulted here in an "unobtainable" guilty verdict, a fortiorari the "plea-bargain".

12. That through an incredible juxtaposition of United States Supreme Court rulings particularly directed toward the Bronx County District Attorney's office; the questionable actions of Assistant District Attorney DAVID S. BLATT; and four recent decisions that have become New York States progeny to Santobello v. New York, 404 U.S. 257 (December 21, 1971) since either the eminently respected, Constitutional Law Expert, former Bronx County Assistant District Attorney Irving Anolik, Esq. represented these defendants or the Anolik rationale and language was responsible for the success of Chase and Cowen decisions, this instant application assumes the posture of an argument of First Impression.

13. So postured, Petitioner's instant argument creates a critical threshold problem of denominating the Prosecutor's actions in purportedly accepting a 'perjured plea' to a 'plea bargain' unfulfilled, and then reneging on the 'plea bargain' to force a trial as a denial of the Fifth and Sixth Federally guaranteed rights is applicable to the States through the Fourteenth Amendment.

14. On October 21, 1954 County Judge WILLIAM LYMAN conducted the proceeding which is responsible for Petitioner 's illegal and unconstitutional conviction. The proceeding commenced with a 'conference at the Bench':

> "MR. SIEGAL: If your Honor pleases, the defendant desires to withdraw his plea of not guilty heretofore entered to the indictment of Manslaughter in the first degree, and at this time plead guilty to the crime of assault in the third degree, a misdemeanor, to cover all counts in the indictment.
>
> MR. BLATT: The People recommend the acceptance of that plea, your Honor.
>
> If your Honor recalls, this case was tried for about a week and a half in front of your Honor in April of this year. At the termination of the trial the jury was unable to reach a verdict and there was a disagreement.
>
> The facts on which this defendant was tried are that on December 26, 1953, at about 8:00 or 8:30 A.M. at Apartment 3-G at 866 Stebbins Avenue, this defendant is alleged to have stabbed to death one Elsie Johnson.
>
> As I say, the Jury disagreed as to whether or not this defendant had stabbed her. However, I don't think there is any doubt that he did assault her in some manner.
>
> In view of these facts I recommend the acceptance of the plea to assault in the third degree.
>
> THE COURT: Julius Fuller, do you now desire to withdraw your plea of not guilty to the indictment, and do you desire to plead guilty to the crime of Assault in the Third Degree?"

15. The general rule is that all warrantless searches are per se unreasonable under the Fourth Amendment. Subject to a few specifically established exceptions (Katz v. United States, 389 U.S. 347) one of which is a search incident to a lawful arrest (People v. Loria, 10 N.Y.2d 368; Chimel v. California, 395 U.S.752) An arrest is lawful when it is based upon probable cause - facts and circumstances such as to warrant a man of prudence and caution into believing that a crime has been or is being committed in his presence (C.P.L.Section 140.10, sec. 140.25; Stacy v. Emory,97 U.S.. 642; Brinegar v.U.S., 338 U.S. 160).

16. It is beyond cavil that defendamt-petitioner would never have interposed his "perjured" guilty plea unless the proffered "plea-sentencing-deal" had not been en"dffér even an innocent man could not have turned down". (See, and compare the rationale of the United States Supreme Court decision in Santobello v. New York, 404 U.S. 257 (December 21, 1971) wherein the Supreme Court decided to review the "plea-bargaining-Deals" that have exacerbated the poor and indigent and ignorant right to trial by the Bronx County District Attorney's offices proclivity to utilize "contrivance" and other means to resolve "improbable" and indictments that should never had been presented by over-ambitious assistant district attorneys" (See and compare Administrator of the Courts THOMAS F. McCOY's statements on District Attorney's who are responsible for indictments that should never have been presented: (Daily News, January 20, 1973: Page 16, cols. 3-5: "ADMINISTRATOR OF COURTS DISAGREES AGAIN WITH GOVERNOR")

17. It is indisputable that Police Department had no "probable cause" to arrest petitioner and search his apartment resulting from the crime committed at 866 Stebbins Avenue. None of the outlined "exceptions" in paragraph (7), discussed INFRA, were involved. The"sentence-promise" unfulfilled and the facts "coerced" from Petitioner upon the entry of the 'perjured plea' supplied the trial transcript with the "missing facts" not FULLER'S, but parrated into the plea-bargain transcript by a "prosecutor-prompted-ignorant-defendant on October 21, 1954 - the reason for the jury verdict.

18. In the remand of Santobello to the lower Court, specific performance of the promise was granted. People v. Santobello, 39 A.D.2d 654 (First Department, 1972). The same relief is appropriate in this case especially since a "deceptive 'contrivance' was originally utilized to compel Petitioner to accept the original 'plea bargain'. As the Supreme Court stated with respect to a promise made in plea bargaining by the prosecution, and which must be deemed to hold a fortiori where the promise is made by the Court itself: "(T)his phase of the process of criminal justice. . . such promise must be fulfilled."

It is beyond cavil that based upon the foregoing legal arguments and the hereinabove outlined fact situation, Petitioner has diligently attempted to 'exhaust his available State remedies' in compliance with sections 2241, 2243, and 2254 of Title 28, United States Code and the Federal Rules of Civil Procedure.

No previous application has been made for the very particular relief requested.

WHEREFORE, it is respectfully prayed the annexed Motion for an Application for a Writ of Habeas Corpus will be endorsed and this application granted, and for such other and further relief as the Court deem necessary, AND,

OR, IN THE ALTERNATIVE, to endorse the annexed Application and Order a Plenary de novo Hearing to determine the Error of Constitutional demension that would vitiate the judgment of conviction at issue at bar, and such other and further relief.

DATED: Cayuga County, N.Y.
March 6, 1973

Respectfully submitted,

Julius Fuller
ACF 61629
135 State Street
Auburn, New York 13021

Sworn to before me this 6th
day of March, 1973

Notary Public

LEGILEE R. GREEN
Notary Public, State of New York
Qualified in Cayuga County #4604
Commission Expires March 30, 19[illegible]

PROOF OF DUE SERVICE

JULIUS FULLER, first being duly sworn, deposes and says:

He has now served three (3) copies of the annexed Application for a Writ of Habeas Corpus and supporting affidavits upon the Clerk of this Court at Foley Square Courthouse, Foley Square, New York 10007; and upon the Attorney General of the State of New York at 80 Center Street, New York City, N.Y. on the day and date notarized hereon via pre-paid United States Mail.

DATED: Cayuga County, N.Y.
March 6, 1973

Yours, etc.,

Julius Fuller
ACF 61629
135 State Street
Auburn, New York, 13021

Sworn to before me this 6th
day of March, 1973

Notary Public,

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

U.S.A. EX REL JULIUS FULLER Relator-Petitioner, - against - HONORABLE ROBERT J. HENDERSON SUPERINTENDENT AUBURN CORRECTIONAL FACILITY, 135 State Street, Auburn, N.Y. 13021	73-Civil AFFIDAVIT IN SUPPORT OF PETITION FOR LEAVE AND FOR PERMISSION TO FILE AND PROCEED AS AN INDIGENT PURSUANT TO SEC. 1915 (a), USCA IN FORMA PAUPERIS

State of New York
Cayuga County SS.:

JULIUS FULLER, in propria persona, first being duly sworn, deposes and says:

That he is the Petitioner-Relator above captioned and is presently incarcerated upon a judgment of conviction defective in law and facts and respectfully submits this instant affidavit in support of the annexed Petition for Leave to Proceed, file and to prosecute this instant application for a Writ of Habeas Corpus and as an indigent in forma pauperis pursuant to sections 1915 (a) USCA.

That he asserts he has no source of income nor other visible means of support and maintains no checking or savings accounts; no health, accident or life insurance policies; nor stocks bonds or other personal property and cannot afford the expenses of the United States Marshall or the security thereof necessary to now commence this action as an indigent.

That he asserts he has a meritorious cause of action; is over the age of twenty-one and a citizen of the United States.

DATED: Cayuga County, N.Y.
March 6, 1973

Respectfully submitted,

Julius Fuller
AOF 61629
135 State Street, Auburn, N.Y.

Sworn to before me this 6th
day of March, 1973

Notary Public

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

15

- - - - - - - - - - - - - - - - x

United States ex rel. JULIUS FULLER,

Petitioner,

- vs -

R.J. HENDERSON, Superintendent of Auburn Correctional Facility, Auburn, New York,

Respondent.

APPLICATION FOR WRIT OF HABEAS CORPUS, PURSUANT TO 28 U.S.C. 2241, 2243-2254, 2255

- - - - - - - - - - - - - - - - x

State of New York)
County of Cayuga)ss:
City of Auburn)

Petitioner, Julius Fuller, being of legal age, moves this Hon. Court for the issuance of a writ of habeas corpus to test the validity and legality of his present confinement and detention.

Petitioner is now in the custody of Hon. R.J. Henderson, Supt. Auburn Correctional Facility, Auburn, N.Y.; wherein, he is illegally imprisoned and restrained of his liberty, in violation of the several mandates of law, under the U. S. Constitution (Amendments, 4, 5 & 14).

JURISDICTION

Petitioner, Julius Fuller, the respondent. Hon. R.J. Henderson, and the subject matter are now in the jurisdiction of this Hon. Court; jurisdiction is invoked under 28 U.S.C., Secs. 2241, 2243, 2254, 2255. Petitioner has exhausted all remedies available to him within the State of New York, and this application for habeas corpus relief is the only remedy.

STATEMENT OF THE CASE

This application is submitted pursuant to the doctrine of FAY vs NOIA, 372 U.S. 391; 28 U.S.C. 2254-2255. Wherein, petitioner has exhausted state remedies on the issues set forth in this application for a writ of habeas corpus. Petitioner is imprisoned for a term of Ten to Twenty years after

conviction for the crime of [illegible] by jury verdict, and judgme
was passed by Hon. Eugene E. Childs, a Judge of the Supreme Court, 16
Bronx County, New York. Petitioner further states that he is illegally deta
on the basis of a prior conviction and commitment; which, in effect, has caus
the enhancement of his detention and is the primary basis for the illegal de-
tention complained of.

That he is in the custody of R.J. Henderson, Superintendent of Auburn
Correctional Facility, Auburn, N.Y. And, reiterates that he is being detaine
unlawfully in violation of due process and equal protection of the law.

EXHAUSTION OF STATE REMEDIES

Petitioner submitted application for writ of habeas corpus on the 12t
day of Nov., 1962 (Ind. # 40 1954) to the Cayuga County Court (Hewitt, J.) a
was denied relief after appearance (in person) on the 24th day of Jan., 1963.
Thereafter, appeal from said denial was sought in the Supreme Court, Appellat
Div., Fourth Dept. Said appeal did not reach final conclusion until May, 197
because of unmitigated circumstances. Such litigation was sought after direc
appeal was taken from the judgment of conviction (See: Appendix attached here

ARGUMENT

Petitioner contends that the trial court abused its statutory authorit
when the court repudiated the plea of guilty agreement entered into on 10/21/
wherein, the records indicate that petitioner was not in the presence of the
court when the plea of guilty was withdrawn; and, the preponderance of proof
attached to the annexed appendix, is acknowledgement of Herbert Siegal, Esq.,
stating that he never authorized substitute attorney (Greenfeld) to represent
petitioner in such capacity. However, petitioner's failure to challenge the
jurisdictional authority of the (trial) court, is by no means a waiver of the
constitutional questions involved. The litigations affected by petitioner's
attempt to obtain judicial relief, clearly shows that the courts of New York
State have relinquished jurisdiction over petitioner and the subject matter.

conviction for the crime of [illegible]

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QUESTIONS PRESENTED

1. Was relator subjected to a form of double jeopardy through a multiplicity of prosecutions?

2. Was relator deprived his right to due process, when the plea of guilty was withdrawn without his presence or consent, and the absence of his retained counsel?

3. Was relator denied due process when the habeas corpus court denied him the requested assistance of counsel?

MEMORANDUM

Petitioner was tried by a jury, for the crime of [illegible] twice - a "Hung Jury" was the final result of the prosecution, and the "juries" were respectively polled, 11-1, 9-3 for acquittal; mistrials were declared by the (trial) court and there was no hearing to determine the sufficiency of the evidence or probable cause, which would show jurisdictional grounds to repeat prosecution. Said "Hung Juries" were implied acquittals of the charges, and the only contribution accredited to relator, is exercising his right to trial by jury. Relator-petitioner further reiterates that the implied acquittals deemed the evidence legally insufficient, by the trial court's motion of mistrial.

As a matter of law, the second and third prosecutions are deemed double jeopardy (See: Secs. 3 & 6 of the N.Y.S. Code of Criminal Procedure). The prohibitions of double jeopardy attach to the instant case, insofar as the declaration of mistrial is not concluded until there is some showing of probable cause (ABBE vs SIMPSON, et seq., 397 U.S. 436; BENTON vs U. S., 372 U.S. 734; U. S. vs TATEO, 377 U.S. 463) In BENTON vs MARYLAND, 395 U.S. 784(1969), the Supreme Court layed it down:

> "The double jeopardy prohibition of the fifth amendment represents a fundamental ideal in our constitutional heritage, and that it should apply to the states through the fourteenth amendment;" and that . . conviction cannot stand once federal double jeopardy standards are applied."

Indeed, relator was denied the benefit of the provisions of the st under the laws of New York State (CCP 3 & 8), which prohibit the successive prosecutions had in the instant case; especially where the jury has deliber in the public interest, established a reasonable doubt, and created a ques- tion of law evolving around the sufficiency of the evidence. (See: ALBRECHT vs U. S., 273 U.S. 1 at p. 8, 47 S.Ct. 250 at p. 252, 71 L.Ed. 505; WEEKS v U. S., 216 F.2d 292 - 2nd Cir.). Therefore, nothing can confer jurisdictio on a court, which lacks competent jurisdiction.

However, after the two (2) "implied" acquittals and declarations of "mistrial" - the trial court entered a binding agreement (on the record; see appendix), accepted a plea of guilty - to misdemeanor assault (3rd degree) a inquired as to the satisfaction of said agreement. Therefore, it escapes in telligent reasoning to believe that such an agreement could be broken by the court without anyone even acknowledging the presence of relator in court; es pecially, where a total stranger presents himself as "substitute" counsel. Moreover, the repudiation proceedings (as recorded) does not meet the standa of the statutory requirements (CCP 337). Acknowledgement, sound reason and consent, are the fundamental requirements for terminating a legal agreement. Therefore, the issue of constitutionality is evident.

After accepting the plea of guilty from relator; the trial court was bound by due process, to make a showing for any change in judgment (CCP 470a) indeed, Art. 1, Secs. 6 & 11 of the N.Y.S. Constitution, guarantees the right to equal protection and due process of law, and further declares that such ri is to be immune from waiver by plea or otherwise (See: PEOPLE vs BEASLEY, 25 NY2d 483; PEOPLE vs SERRANO, 15 NY2d 304; PEOPLE vs MC KENNICH, NY2d No. 179 1970. Therefore, the trial court did not merely abuse its discretionary powe but failed to comply with the demands of due process. (See: JOHNSON vs ZERBST 304 U.S. 458-464(1938); GIDEON vs WAINWRIGHT, 372 U.S. 335; DOUGLAS vs CAL- IFORNIA, 372 U.S. 353). Petitioner craves to bring to the court's attention

that defense counsel (Herbert Siegal) unequivocally states that he never agreed, consented or advised the withdrawal of relator's plea of guilty. Not only due process, but the laws of New York State prohibit the withdrawal of a guilty plea without the explicit consent of the defendant (PEOPLE ex rel. JEMMERSON vs FREBERG, 137 Misc 314, 243 NYS 590).

Petitioner, Julius Fuller, subject to the best of his ability as a layman, has layed his complaints before the courts of New York State; however, he was deprived of the assistance of counsel on the habeas corpus proceedings held before the Cayuga County Court (Hewitt, J.). Wherein, relator appeared before the court (1/24/63) and requested the professional assistance of counsel; the request for the assistance of counsel was denied and subsequent Appellate Review, did not bring forth any redress or relief. In seeking relief within the courts of the State of New York, relator set forth the basic facts and circumstances, as layed down herein (Double Jeopardy, Repudiation, and Denial of Counsel).

In reference to the denial of counsel on the habeas corpus hearing, petitioner was deprived of the opportunity to competently defend his allegations in open court (See: GIDEON vs WAINWRIGHT, supra; DOUGLAS vs CALIFORNIA, supra); and, when relator informed the court that he was not qualified to cross-examine, and asked for the assistance of counsel, the habeas corpus court (Hewitt, J.), affectively deprived relator the equal protection of the law, when the court denied the request for counsel. See: GRIFFIN vs ILL., 351 U.S. 12, 13, where it is stated in part:

> "The question presented here is whether Illinois may, consistent with the Due Process and Equal Protection Clauses of the fourteenth amendment, administer this statute so as to deny adequate appellate review to the poor while granting such review to all others."

Petitioner was denied the opportunity to present a corpetent record to the Appellate Court on appeal. When relator informed the court of his incompetency and the court (Hewitt,J.) refused to assign counsel, it was absolutely clear that the record on appeal would not do relator's allegations any justice. (-ee: VON MOLTKE vs GILLIES, 332 U.S. 708, 721 et seq 64)

Habeas corpus is the proper (only) administrative remedy available to relator, and jurisdiction is exclusively in this court. (See: HLAND vs ALABAMA 5 Cir. No. 22872 (12/27/65), cert. den. 34 U.S. L.W. 3320, 3/21/66), wherein, it is stated in part:

> "The federal courts have seized upon the general words of the statute regulating proceedings in habeas corpus that - 'The court shall summarily hear and determine the facts, and dispose of the matter as law and justice requires' . . ."

It is further stated herein, that the state (New York) is collaterally estopped in regards to the issues set forth in this application; wherein, the state has relinquished jurisdiction over the subject matter and has failed to provide adequate remedy. Res Judicata prevents relator-petitioner from re-litigating his claims in the courts of New York State. Therefore, exclusive jurisdiction rests within this Hon. Court (28 U.S.C. 2241, 2243, 2254, 2255).

The effect of the above cited complaints, is the direct cause of relator's present illegal detention, and relator-petitioner prays that he be granted his deliverance from said illegal detention; or, in the alternate, relator craves all relief that may be deemed just and proper by this Honorable Court.

Respectfully submitted,

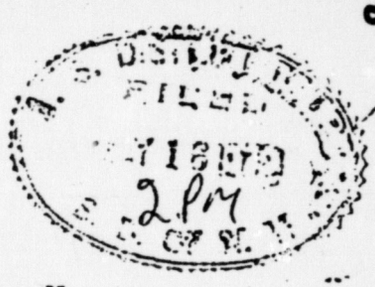
Julius Fuller, Pro Se

Sworn to before me this
1st day of [illegible], 1971

[illegible]
NOTARY PUBLIC

EDWARD J. BYRNE
Notary Public, State of New York
Qualified in Cayuga County #1344
Commission Expires March 30, 1972

21



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

UNITED STATES OF AMERICA ex rel.
JULIUS FULLER,

Petitioner,

-against-

R.J. HENDERSON, Superintendent of Auburn Correctional Facility, Auburn, New York,

Respondent.

----------X

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71 Civ.4274
PRO SE

CANNELLA, J.

The petitioner's application for a writ of habeas corpus, made pursuant to 28 U.S.C.§§2241 et seq., is denied.

On January 8, 1954, the petitioner was indicted in Bronx County for the crime of manslaughter in the first degree. At his first trial, the jury was unable to reach a verdict. Thereafter, on October 21, 1954, the petitioner withdrew his plea of not guilty to the crime charged and agreed to plead guilty to the lesser crime of assault in the third degree to cover all counts of the indictment. After accepting this

plea, Honorable William Lynch, a Bronx County judge, scheduled the date of sentencing for December 7, 1954. However, on that date the plea of guilty was withdrawn on consent of the government and the trial of the case was set for January 3, 1955. The petitioner subsequently was tried again and the jury once again failed to agree upon a verdict. Following a third jury trial, the petitioner was convicted of the crime of manslaughter in the first degree. On November 8, 1956, he was sentenced to a term of imprisonment of ten to twenty years. This conviction was affirmed on appeal. People v. Fuller, 9 App.Div.2d 877, 193 N.Y.S.2d 600 (1st Dep't 1959), affd., 8 N.Y.2d 866, 203 N.Y.S.2d 867 (1960).

Following his appeal, the petitioner instituted habeas corpus proceedings in the state court, asserting that he was deprived of his right to due process because his plea of guilty to assault in the third degree was withdrawn without his consent and in the absence of both himself and his retained counsel. After a hearing on this question in the Cayuga County Court, Honorable Gerald S. Hewitt, by an order dated March 36, 1963, dismissed the writ. That order was affirmed

on appeal. People ex rel. Fuller v. Warden, 300 N.Y.S.2d 313 (4th Dep't), leave to appeal denied, 24 N.Y.2d 740, 302 N.Y.S.2d 1025(1969). Thus petitioner has exhausted available state remedies and is properly before this court. 28 U.S.C.§2254.

In this application, the petitioner again alleges that his guilty plea was withdrawn without his consent and in the absence of himself and his retained attorney. 1/ The court finds that this claim is without merit. At the hearing on this claim before the state court, Mr. David S. Blatt, Esq., the Assistant District Attorney who prosecuted the case, testified that on October 21, 1954 he was asked by Mr. Herbert S. Siegal, Esq., petitioner's attorney, in petitioner's presence whether he would promise a suspended sentence by the court if the petitioner pleaded to a lesser count. Mr. Blatt refused to make any recommendation to the court but did agree not to oppose a withdrawal of this plea

1. The court finds no merit to petitioner's contention that the "hung jury" in the first trial was an implied acquittal, subjecting him to double jeopardy in the second and third trials. United States v. Tateo, 377 U.S.463,467 (1964). The court likewise is not persuaded by petitioner's argument that he was denied due process by the state court's denial of his application for appointment of counsel for his state habeas corpus proceedings.

if a suspended sentence was not forthcoming on the date of sentencing. Shortly thereafter, the petitioner pleaded guilty to assault in the third degree. However, on December 7, 1954, the date of sentencing, Judge Lyman refused to promise a suspended sentence. Mr. Aaron Greenfield, Esq., appearing for Mr. Siegal therefore moved to withdraw the plea of guilty; Mr. Blatt consented to this withdrawal "as per the understanding...on the date of taking the plea"; [2] and the court allowed this withdrawal and the reinstatement of a plea of not guilty. The petitioner contends that this proceeding was conducted outside his presence. [3] However, Mr. Blatt [4] testified that he recalled that the petitioner was present at that proceeding. In addition, he testified that it was the invariable practice of Judge Lyman to forfeit bail when a defendant failed to appear for sentencing.

2. Hearing Minutes of December 7, 1954, p.2.
3. The petitioner bases his argument in part upon the fact that the record of this proceeding does not indicate his appearance. However, it apparently was not the practice of the court reporter who was there to show the appearance of a defendant on the record of such a proceeding. Hearing Minutes of January 10, 1963, p.18.
4. The judge presiding at the habeas corpus hearing on January 10, 1963 found that this witness was an attorney at law for nearly 25 years and had a very high reputation of personal integrity.

Therefore, since bail was not forfeited at this proceeding, it also may be inferred that the defendant was present. After a review of the entire record, the court finds that the petitioner was present at these proceedings on December 7, 1954 and, due to the refusal of the sentencing judge to promise a suspended sentence, he gave his consent to the withdrawal of his guilty plea at that time. Furthermore, the court finds that he was represented by competent counsel at that proceeding. 5/

In view of the foregoing, the petitioner's application for a writ of habeas corpus is denied. The Clerk of the Court is directed to send a copy of this opinion to the petitioner.

So ordered.

Dated: New York, N.Y.

May 16, 1972.

John M. Cannella
U.S.D.J.

5. The court notes in passing that a defendant suffers prejudice in fact when he enters a plea of guilty without advice of counsel concerning such a plea; but generally such an individual who has pleaded not guilty cannot claim actual prejudice in that respect. Nash v. Reincke, 325 F.2d 310, 312-313 (2d Cir. 1963). The court also notes that the petitioner did not raise these objections either prior to or during his second and third trials. In any event, by a letter to the petitioner dated October 29, 1969, Mr. Seigal recalled that he was unable to appear in court on petitioner's behalf and that he therefore required Mr. Greenfield to appear. The court finds no fault in this procedure. See, e.g., Murphy v. Holman, 242 F.Supp. 480, 482 (M.D.Ala. 1965); United States v. Myers, 231 F.Supp. 522 (E.D.Pa. 1964).

STATE OF NEW YORK : COUNTY COURT
COUNTY OF CAYUGA : SPECIAL TERM

26

- - - - - - - - - - - - - - - - - - - x
THE PEOPLE OF THE STATE OF NEW YORK,
ex rel. JULIUS FULLER,

Petitioner,

-against-

VERIFIED PETITION
FOR
WRIT OF HABEAS CORPUS

HON. ROBERT E. MURPHY, AS WARDEN OF
AUBURN PRISON, AUBURN, NEW YORK,

Respondent.
- - - - - - - - - - - - - - - - - - - x
State of New York)
County of Cayuga)ss:

TO: THE HONORABLE GERALD S. HEWITT, JUDGE OF THE
COUNTY COURT : COUNTY OF CAYUGA.

JULIUS FULLER, first being duly sworn, deposes and says, that he is the relator in the above entitled action; that he is over twenty one years of age, and that he is presently confined at Auburn State Prison, 135 State Street, Auburn, New York.

That he is being imprisoned and restrained of his liberty at Auburn State Prison by Robert E. Murphy, Warden of said Prison.

That he has not been committed and is not detained by virtue of any judgment, decree, final order or process specified in Section 1231, of the New York State Civil Practice Act.

That the cause or pretense of such imprisonment and restraint, according to the best knowledge and belief of your petitioner, is a commitment, warrant, order or process issued by the Hon. Eugene G. Schulz, a Judge of the Bronx County Court, Bronx, New York.

(at page 2)

That annexed hereto marked exhibit "A" is a copy of the mandate by virtue of which said prisoner is pretended to be imprisoned and restrained. That your petitioner alleges that said imprisonment, under said pretense, is illegal.

That no previous application for the relief requested herein has ever been submitted to any court, Judge or Justice.

That your petitioner alleges that such imprisonment and restraint is illegal, among other things, in this, to wit:

That the judgment of said Justice or court in execution of which the said pretended commitment, warrant or process was issued, was, and is absolutely void for want of jurisdiction to render same.

FACTS

That the Grand Jury, Bronx County, on or about the 8th day of January, 1954, returned an indictment against petitioner charging the crime of manslaughter in the first Degree.

That on or about the 4th day of May, 1954, trial commenced before the Honorable William Lyman, Judge of the Bronx County Court.

That on or about the 28th day of May, 1954, the jury could not agree upon a verdict and was discharged. It was later ascertained that the jury was 11 to 1 for acquittal.

That on October 21st, 1954, petitioner pleaded guilty to the crime of assault in the Third Degree, in satisfaction of indictment #40/1954, found by the Grand Jury of Bronx County on January 8, 1954. (Annexed hereto marked Exhibit "B" is a copy of pleading minutes). Attached hereto, and marked Exhibit "C", is a copy of the recommendation given for the plea by the District Attorney as required by section 342-a of the Code of Criminal Procedure. Also annexed and Marked Exhibit "D" is a copy of the minutes of the withdrawing of petitioner's plea in the Bronx County Court. It is important to note

(at page 3)

that these minutes show that petitioner was not present at these proceedings. It is also respectfully brought to the Court's attention that the attorney who's name appears on these minutes never spoke at any time to petitioner. Petitioner's attorney's, who were retained, were Herbert S. Soigal, Esq. and Arthur Layton, Esq. Bronx, New York.

That on December 7, 1954, while in the corridor of the Bronx County Court, petitioner was informed by the Assistant District Attorney who prosecuted the aforementioned trial, that the plea petitioner had entered to As-

Assault in the Third Degree on October 21, 1954, had been withdrawn by the court, and that a new trial would commence in the near future.

That on May 29, 1956, petitioner appeared in Bronx County Court where a retrial on Indictment #40/1954 commenced. Once again the jury failed to agree upon a verdict. It was later ascertained that this time the jurors were 9 to 3 for acquittal.

That on September 12, 1956, petitioner was found guilty as charged to the indictment #40/1954, of which he had previously pleaded guilty to Assault in the Third Degree in satisfaction of said indictment. That on November 8, 1956, petitioner was sentenced by the Hon. Judge Schulz to a term of not less than 10 nor more than 20 years.

C O N T E N T I O N

1. That the County Court, Bronx County, (Lyman, J.), had no basis in fact or law to retract, without petitioner's presence in court, the plea entered on October 21, 1954, to Assault in the Third Degree in full satisfaction of indictment #40/1954.

(at page 4)

2. That when petitioner, in good faith, pleaded guilty to Assault in the Third Degree on October 21, 1954, in satisfaction of indictment #40/1954, the indictment was disposed of, and all that was left for the court to do was to impose judgment.

3. That therefore, the County Court, Bronx County, (Schulz, J.), was without jurisdiction to conduct a trial and impose sentence upon indictment #40/1954 which was disposed of as aforesaid.

L A W

Section 3 of the Code of Criminal Procedure States:

"No person permissable but on legal conviction. No person can be punished for a crime except upon legal conviction in a court having jurisdiction thereof."

(Emphasis supplied). (Please see: sec. 3, 4, and 5 of the Code of Criminal Procedure).

Sections 332, 333, 334, 335 and 337 of the New York State Code of Criminal Procedure sets forth the procedure for pleas of guilty to be entered by a defendant.

Sec. 342-a of the Code sets forth the "requirements" for pleas of guilty to lesser offense than charged.

The aforementioned sections together with all other provisions of the Code of Criminal Procedure, must be strictly followed by the courts when a criminal action or proceeding comes before them (see Sec. 962 Code).

(at page 5)

The court in People ex rel. Hirschberg vs. Orange County Court, 271 N.Y. 151, 155(1936), wherein the order of a court of Criminal Jurisdiction summoning a jury for the purpose of determining whether a defendant had previously pleaded guilty to a felony or misdemeanor, stated that:

> "The Code of Criminal Procedure establishes the practice in all criminal cases and the authority for the orders and judgments of the courts. Unless we can find there some justification for the above order, it does not exist."

In PEOPLE v Glen, 173 N.Y. 395, 400 (1903), the Court said in reference to motions to set aside indictments:

> "Such matters are now regulated by the provisions of the Code of Criminal Procedure, and however inconvenient or even oppressive they may appear to be in specific cases, the courts must apply them, as best they can, for they embody the commands of the law - - - making power in matters wherein its fiat is supreme and final."

See also: People v Havey, 92 N.Y. 554 (1883); People v Redmond, 225 N.Y. 206 (1919); People v Adler, 140 N.Y. 331 (1893); People ex rel. Jerome v. Courts of General Sessions, 185 N.Y. 504 (1906); People v Bissert, 71 App. Div. 118, 75 N.Y.S. 630 (1902).

It is respectfully submitted, and your relator feels, it is evidenced by the records attached to this petition, that the Bronx County Court was without jurisdiction to further act upon the indictment in question once relator pleaded guilty to assault in the Third Degree in satisfaction of said indictment on October 21, 1954, and further, that the court did not have the

power to withdraw the aforementioned plea without relator's presence in the courtroom.

(at page 6)

In fact, it is relator's contention that no statute of the New York Code gives the court the power to withdraw a previously entered plea without the presence of the defendant, who personally entered said plea.

The objectives of the designers of the Code of Criminal Procedure was uniformity with simplicity. People v Bissert, supra. The simplicity is supposed to be such that criminal procedure would become plain and intelligible to the ordinary mind. People v. Wilson, 151 N.Y. 403 (1897). Because of its designed clarity, all of its provisions are to be strictly construed keeping in mind the interests of justice and the substantial interest of the accused. People v Adler, supra. By the same token technical errors and mistakes in form are to be overlocked when not material, sec. 684 Code; People v. Adler, supra. Suffice to say, the effort toward simplicity and clarity woven into the Code is intended, as is every section of the Code, to preserve the right of the accused to a fair trial. The courts and prosecuting officers must be required to comply with every salient provision in the Code or later generations may suffer from precedents destructive of the high degree of criminal justice we have come to expect in New York State.

As will be discussed later in this memorandum, the present application asks only whether the court that convicted JULIUS FULLER had the power or jurisdiction to so-act upon an alleged indictment which had been previously disposed of by a plea of guilty as aforesaid. (See exhibits "B" and "C").

(at page 7)

In this connection, the Court of Appeals in reversing a judgment of the Appellate Division said:

> "An indictment requires the action and intervention of a grand jury. There is no substitute for that body, and a court may not - - - exercise the functions of the grand jury."
> People v Eastman, 307 N.Y. 336 at page 338, 121 N.E. 2d 357, at page 358.

Indeed, to deny an accused the opportunity of establishing that vital statutory provisions set up for his protection were not adhered to would be impairment of a constitutional right. Walker v. Johnston, 312 U.S. 275(1941).

The further possibility that relator made a waiver of some kind is obviated by his absence at the time the court ordered the plea previously entered, withdrawn, People v. Richetti, 109 N.Y.S.2d 44, 45 (1951); Walker v. Johnson, supra; In addition, see People ex rel. Battista v. Christian, 249 N.Y. 314 (1928). Only a privilege may be waived by the accused. A statutory or constitutional defect in procedure, which is requisite to jurisdiction to try, condemn and punish, may not be waived. People ex rel. Wojek v. Henderson, 134 Misc. 228, 235 N.Y.S. 173 (1929). It might also be said that this application is tardy after nearly seven years, or that any right relator might have had is dead due to laches. These contentions lack substance.

This proceeding is aimed at determining whether the trial court in question had the power, in the circumstances, to conduct a trial after a plea of guilty had been entered by your relator, and withdrawn by the court without relator's presence.

(at page 8)

Whether the court had power is not settled by pointing to lengthy lapse of time between event and application. see Bojinoff v. People, 299 N.Y. 145, 149 (1949). As to laches, there is a strong presumption against such a defense where a matter of liberty is involved. In People ex rel. Albanese v. Hunt, 177 Misc. 151, 30 N.Y.S. 2d 137 (1941), reversed on other grounds 266 App. Div. 105, 41 N.Y.S. 2d 646 (1943), affirmed 292 N.Y. 528 (1944), where a fourteen year lapse did not bar an attack on an allegedly illegal conviction.

As to the appropriatives of Habeas Corpus in the case at bar, it is respectfully submitted that the wording of Section 1231(2) of the C.P.A., limiting the issuance of a writ where a final judgment of a competent trial court is involved, retains to the court making the judgment or decree, or issuing the process, had legal and constitutional power to give such judgment or send forth such process. People ex rel. Tweed v. Liscomb, 60 N.Y. 550, 570

(1875) see definition of competency in Landers v. Staten Island Railroad R.R. Co., 53 N.Y. 450, 124 A.L.R. 1080(1873). "Thus competency in a court measured by its power * * *. "People ex rel. Fisher v. Morhous, 183 Misc. 5 49 N.Y.S. 2d 111, 116 (1944). It might also be pointed out that relator in this matter does not believe to have any other remedy which is adequate and per to raise the issue of the legal power of the trial court.

When the court does review the trial court's jurisdiction in a case where a judgment causes imprisonment, it determines only whether the trial court was legally empowered to try the particular charge against the particular person.

(at page 9)

People ex rel. Carr v. Martin, 286 N.Y. 27 (1941), consequently it is permissable, in the case at bar, to employ a habeas corpus proceeding to attack a judgment that causes a person to be imprisoned on the ground that the trial court was not legally empowered to convict and sentence. That is, the trial court operating without no statutory provision to revoke a plea entered in good faith by a defendant, especially without defendant's presence and thereafter ordering defendant to trial.

CONCLUSION

It is, therefore, respectfully submitted that in the matter before the court, as records and testimony will prove, the court which tried and convicted relator was without jurisdiction to do so.

Wherefore, relator prays that a writ of Habeas Corpus issue directing and commanding the respondent to have the body of JULIUS FULLER, by him imprisoned and detained, together with the cause of such imprisonment before this Court, that the imprisonment be declared illegal.

Very respectfully submitted,

s/ JULIUS FULLER
Petitioner Pro se.
Auburn State Prison
135 State Street
Auburn, New York

Signed and sworn to before
me this 11th day of December, 1962

s/ MILLARD LAND
NOTARY PUBLIC

Exhibit A

26A

Jan 63

Hon. Justice ____. Hewitt

Etc

Dear Sir: Re:(Fuller v Murphy.. Habeas corpus proceeding)

Please accept this letter as a motion for assignment of counsel in the above named proceedings.

I feel that since witnesses are to be called in this proceeding that petitioner is not sufficiently versed in law and proceedure to competently cross examine any witness. This examination which only a trained attorney can handle is beyond my ability and I have had no formal training in this profession.

I am sending this motion now so that it won't be necessay to have an additional postponement and consequent transportation of the petitioner and to permit time for counsel, if assigned, to familiarize himself with the case and proceedings.

I am sending a copy of this letter to the respondents counsel in this action, Mr. ____ Elder, Assistant Attorney General, by United States Mail.

Respectfully,

J. Fuller, 5_____
Petitioner
135 State Street
Auburn, N.Y.

cc: to- Mr. ___ Elder, Asst. Atty. Gen.
his address

ROBERT A. CONTIGUGLIA
Assistant Attorney General
412 Metcalf Building
Auburn, N. Y. 13021

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33

STATE OF NEW YORK
COUNTY COURT COUNTY OF CAYUGA

THE PEOPLE OF THE STATE OF NEW YORK,
ex rel., JULIUS FULLER,
Relator,

-vs-

ROBERT E. MURPHY, Warden of Auburn State
Prison, Auburn, N. Y.,
Respondent.

January 10, 1963

HON. GERALD S. HEWITT, COUNTY JUDGE

APPEARANCES: Mr. William S. Elder, Assistant Attorney General of the State of New York, for Respondent
Mr. Donald Halsey, Deputy County Clerk
Mr. Joseph J. Gratton, Head Correction Clerk, Auburn Prison
Julius Fuller, Relator, in person

Court: This writ was issued on December 28th returnable this morning. Relator appears in person and the Warden by Mr. William S. Elder, Assistant Attorney General.

Do I understand you were sentenced on November 8, 1956, in Bronx County to a term of ten to twenty years?

Fuller: I believe that is correct, sir.

Court: Do I also understand that you claim that the Bronx County Court didn't have jurisdiction in this matter?

Fuller: Yes, sir.

JULIUS FULLER SWORN BY JUDGE HEWITT.

EXAMINATION BY JUDGE HEWITT:

Q. What are the facts surrounding this matter?

A. I have them here, sir. I was tried, I believe it was in May, 1954 before Judge Lyman. The Jury was discharged and they were 11 to 1 for acquittal -- I learned this later. I was brought into Court and given a chance to plead to assault, third degree -- this I accepted.

Q. Did you plead to that?

A. Yes.

(Fuller submits copy of minutes - Exhibit 1 - dated October 21, 1954 and December 7, 1954 - certified by Charles J. DeSantis, Official Court Reporter. No objection to Exhibit 1 by Mr. Elder. Exhibit 1 received.)

I have here also a photostatic copy of the District Attorney's recommendation for the acceptance of this plea.

(Exhibit 2 - Copy of District Attorney's recommendation - dated October 21, 1954, offered in evidence - no objection by Mr. Elder - Exhibit 2 received.)

Q. You were not in Court on December 7th?

A. I was waiting for my lawyer. I saw the Assistant District Attorney - he said Siegal was in Court. The Court had withdrawn my plea and the case was set down for trial. At this time I didn't have notice. In the proceedings of December 7th, Greenfeld was in Court. At no time did I talk with Greenfeld - I had no knowledge of the proceedings going to take place. On the last page - what the District Attorney had to say with reference to my

lawyer. Mr. Platt asked the Court. No one talked to me about this. It doesn't show that the Court asked the defendant a question.

Mr. Elder: May I cross-examine the witness?

Court: Yes.

CROSS-EXAMINATION BY MR. ELDER:

Q. After your plea of guilty to the assault, third degree, was withdrawn, you went to trial before a Jury, did you not?

A. I did.

Q. You were represented by one Siegal?

A. I was.

Q. Did you or Mr. Siegal at any time during the course of that trial have any question as to the jurisdiction upon the grounds that you had not knowingly and voluntarily asked to withdraw the plea of assault, third degree which request was permitted you? Did you raise that objection?

A. I don't know -- the question is kind of long.

Q. I will withdraw the question.

At any time during the trial which resulted in your conviction of manslaughter, did you or Mr. Siegal make the objection that they shouldn't try you for manslaughter because you had never withdrawn your plea of assault, third degree?

A. This was a proceeding that was over a few weeks ago---

COURT: Do you remember?

A. Not to my recollection.

Q. You have no recollection of raising this objection?

A. No, I don't.

Q. Any recollection whether you or your counsel raised that objection after conviction?

A. I don't believe the question was raised.

Q. After you were sentenced you appealed your conviction to the Appellate Division?

A. It was appealed.

Q. The conviction was affirmed with opinion -- 9 A. D. 2nd 877, 8 N. Y. 2nd. Mr. Fuller, in the Appellate Division opinion, one of the Justices who wrote an opinion, made a footnote referring to the fact that at one point you had been permitted to dispose of the matter by pleading to assault, third degree, and later permitted to withdraw and reinstate your plea of not guilty. Do you know if that is so?

A. In part, sir. I believe the footnote - page 601, it says defendant had been tried -- 11 to 1 acquittal - later allowed to plead.

Q. After the Appellate Division had affirmed your case, you appealed to the Court of Appeals, did you not?

A. I did.

Q. The conviction was affirmed without opinion?

A. Yes.

Q. Did your attorney in either of the two appeals raise this same objection which you are raising

today?

A. Not to my knowledge.

Q. That is all, but I do call attention to these facts.

(Oral argument by Fuller)
oral
(Answering/argument by Mr. Elder.)

(Oral argument by Fuller.)

Court: I am going to reserve decision at this time. My reaction is that this should be a coram nobis proceeding. In fact I am pretty sure it is. This is an error that was made in that Court. If the error was made in that Court, it is up to that Court to correct the error. On a habeas corpus I doubt that I have the right to inquire into the proceedings held in Bronx County in 1956.

(Recess)
(Fuller returned to Court Room. Same appearances)

Court: I have been thinking this over and I am going to accept jurisdiction and adjourn the matter for further testimony, until January 24, 1963, at 2:30 in the afternoon. If you have any witnesses or anyone who can or may testify to your presence in Court when Greenfeld made a motion to withdraw your plea - have them here at that time and I will direct Mr. Elder if he has any witnesses to have them here at that time.

January 24, 1963

HON. GERALD S. HEWITT, COUNTY JUDGE

APPEARANCES: Mr. William S. Elder
Mr. H. Richard Taylor, Deputy County Clerk
Mr. Joseph H. Gratton
Julius Fuller, Relator
Mr. David S. Blatt

(Exhibit 1 - Relator - Minutes of October 21, 1954 and December 7, 1954 - Bronx County Court offered in evidence and received.)

(Exhibit 2 - Relator - Photostatic copy of Statement Indictment 40/1954 - Bronx County Court, October 21, 1954 offered in evidence and received.)

(Exhibit 3 - Relator - Photostatic copy of Indictment 10/1943 - offered in evidence and received.)

MR. ELDER: I would like to assume the cross-examination of Mr. Fuller. You are still under oath.

Q. Do you remember withdrawing your plea to manslaughter and entering a plea to assault, third degree?

A. I do, sir.

Q. At that time was there something about you getting a suspended sentence if you pleaded guilty to assault, third degree?

A. Not to my knowledge.

Q. Do you remember either you or your attorney being advised by Mr. Blatt that if you did not get a suspended sentence for assault, you would be permitted to withdraw your plea and reinstate your plea of not guilty to manslaughter?

A. I don't remember any agreement -- it was not discussed in my presence.

Q. Mr. Siegal never told you that?

A. No.

Q. The date you withdrew your plea of guilty to assault, third degree, and pleaded not guilty to manslaughter, first degree, was December 7, 1954, was it not?

A. That's the date of the record.

Q. On December 7, 1954 was the date set for the sentence on your third degree assault plea, wasn't it?

A. Yes.

Q. That was the day that if you hadn't withdrawn your plea, you would have been sentenced?

A. If it hadn't been withdrawn, sure.

Q. You at that time had a previous conviction for a felony?

A. I don't remember any conviction on the record -- what does the record show?

Q. Where was your home?

A. Detroit.

Q. How long had you been in Bronx County?

A. Approximately three or four years.

Q. Were you aware of the fact if you weren't physically in Court your bail would have been forfeited?

A. I was waiting in the corridor.

Q. Do you recall on December 7, 1954 having a conversation

with your counsel, Mr. Greenfeld, and Mr. Blatt, of the District Attorney's office?

A. No, sir. I didn't speak to Mr. Greenfeld on December 7th -- I did speak to Mr. Blatt. I can quote it verbatim -- I saw Mr. Blatt, the Assistant District Attorney -- I asked if Siegel was present in Court and he informed me he wasn't and that the Court had withdrawn my plea and the case would be set down for trial.

Q. Prior to your plea of guilty to assault, third degree, having been withdrawn and prior to counsel Greenfeld having reinstated the plea of not guilty, did Mr. Blatt on that day, tell you that if you were to reinstate your plea of not guilty to manslaughter you would either be ultimately acquitted or convicted, and if convicted you would receive a sentence with a minimum of ten years?

A. You are thinking of December 7th? No, sir, no such conversation took place.

Q. Were you aware that Mr. Greenfeld was representing you that day?

A. No.

Q. Have you ever met Mr. Greenfeld?

A. I don't recall. I never gave him permission to answer on my behalf.

Q. Did you ever have any conversation with Mr. Greenfeld relative to this manslaughter case?

A. I don't know. Mr. Siegel was my lawyer -- this case was tried over three years -- maybe I have, I don't know.

Q. Your memory of the defense evidence is merely vague and unreliable?

A. So far as my memory -- I have the record.

Q. The only basis for your testifying that you were not physically present in the Courtroom on December 7, 1954 is the stenographic record of what took place pertaining to your case -- just yes or no?

A. I can't answer that.

Q. This position is largely based on what you read in the stenographic transcript of the proceedings -- is that right?

A. Yes.

Q. Since 1961 -- is that when you obtained the transcript?

A. Is that the date of the censor stamp?

COURT: IT IS OCTOBER 4, 1961.

Q. Since October 4, 1961, you have been aware that you were represented by Attorney Greenfeld, counsel to Mr. Siegel, is that right?

A. Yes.

Q. Hav e you ever since that date written to Mr. Siegel or communicated in any way as to what his recollection was, whether or not you were physically present in the Courtroom on December 7, 1954?

A. There would be no point.

Q. Is your answer "yes" or "no"?

A. I have corresponded - tried to get Greenfeld to find out if Siegel was there himself.

Q. I will ask you this question -- since October, 1951, have you corresponded with Attorney Aaron Greenfeld, or been in communication in any way, to find out if Attorney Aaron Greenfeld has any recollection whether or not you were in the Courtroom on December 7, 1954?

A. I have tried to communicate with Greenfeld by writing to the President of the Bar to get his address/ I have never received an acknowledgement -- I have written several letters to Siegel in regard to this matter. I did not receive an answer.

COURT: Have you anything more you would like to put in?

A. Yes, sir. I don't have the notes -- my mind is drained. The questions Mr. Elder has asked here -- I am not skilled in examining witnesses and the reason for certain questions -- you gave me the impression you wanted just the truth of this matter. As to the testimony, I don't know how to cross-examine.

COURT: Is there anything else you want to say?

A. Yes, sir. I wrote and got a photostatic copy of the indictment with endorsements -- it don't make too much sense to me.

(Relator's Exhibit 3 - Indictment with endorsements offered in evidence. No objection by Mr. Elder. Exhibit 3 received.)

(Oral argument by Fuller.

COURT: You say you were not in the Courtroom? You are positive?

A. Yes, sir.

COURT: You are not mistaken?

A. No, sir.

MR. DAVID S. BLATT SWORN BY JUDGE HEWITT.

EXAMINATION BY MR. ELDER:

Q. Your full name, please?

A. David S. Blatt.

Q. Your occupation?

A. Assistant District Attorney, Bronx County.

Q. Naturally you are an attorney at Law?

A. Yes.

Q. Duly admitted to practice when?

A. December, 1938.

Q. Mr. Blatt, have you practiced law in and about New York City?

A. I have.

Q. When did you become connected with the District Attorney's Office?

A. December, 1947.

Q. What duties have you performed there since that time and up through the year 1956?

A. I was associated with Magistrate's Court as Assistant District Attorney about a year or year

and a half, Court of Special Session for about two years -- County Court as Assistant District Attorney -- I am now in charge of trial Court as Senior Assistant.

Q. What were your duties in 1954-1956?

A. I was in charge of Narcotic Bureau.

Q. Are you familiar with the case of Julius Fuller, the relator?

A. I am.

Q. Did you prosecute the case?

A. I did.

Q. How many trials were had?

A. Three.

Q. You prosecuted the first trial?

A. Yes.

Q. What was the result of the first trial?

A. Disagreement.

Q. What next occurred in the course of that prosecution following that trial?

A. Disagreement and Siegel

Q. Who was Siegel?

A. He was the attorney for Fuller. I may say I remember this case because it was the first trial Judge Lyman sat as Judge of the County. Certain questions were allowed that I objected to. The date Fuller entered a plea was October 21, 1954.

Q. I believe one of the Exhibits shows a change of plea?

A. On October 21, 1954, Mr. Siegel, Fuller and myself had a conference. Fuller was in on the conference. At that time, in the presence of Fuller, Siegel said - "Why don't you give us an assault, third degree and we will then plead providing Fuller can get a suspended sentence". I said to him and I said to Fuller - "I will not recommend a suspended sentence, but in view of the evidence, I will recommend theassault, third degree, but in the event the Judge doesn't go along with a suspended sentence, I will consent to a withdrawal of the plea to assault, third degree," --- after that conversation we got in the Court Room, Fuller pleaded guilty to assault, third degree - the case came on for sentence, I believe, December 7, 1954 -- the case was on for sentence. It is the invariable practice for the District Attorney and County Court, if defendant does not show up for sentence, if he is not in the Courtroom -- bail is forfeited. If he is not there, bail is forfeited. No bail was forfeited in this case. Immediately there was a withdrawal of plea. I spoke to Fuller and to Greenfeld, who I spoke to last Thursday or Friday -- this is a definite recollection of mine. I would at no time allow a defendant to withdraw a plea if he was not present. We had a conversation, I said to Fuller - "If you withdraw the plea, it is going to be an acquittal or conviction -- if it is a conviction, it would be a minimum of ten years". Fuller then said he didn't want to go ahead if he didn't get a suspended sentence. Only after the conversation with Greenfeld and Fuller was this plea withdrawn. I was not in

favor of this plea -- I was primarily induced because of the evidence allowed in the first trial.

Q. Now, Mr. Blatt, had Siegel and Fuller immediately before the change in plea on December 7, 1954, asked you to recommend to Judge Lyman a suspended sentence?

A. I said if the Judge didn't give him a suspended sentence I would allow him to withdraw his plea.

Q. I don't suppose at that time in December, 1954, and immediately before you all went back into the Courtroom, anyone knew what Judge Lyman would do if the plea was not withdrawn to assault, third degree.

A. That is right. It is absolutely certain when that case was called, certainly we didn't know what was going to happen. I knew Siegel had talked with Judge Lyman -- when we appeared if the defendant had not been there, bail would have been forfeited. When we approached the Bench then the proceeding took place.

Q. Who was with you then?

A. Greenfeld.

Q. Do you remember the substance of the talk as you approached the Bench?

A. The Judge would not give him a suspended sentence. After that Greenfeld made the motion to withdraw the plea.

Q. During the course of your practice as Assistant District Attorney up to and including December 7, 1954, was it always the practice to have the defendant in Court at all of the proceedings?

A. Yes - if the defendant is not present in Court, bail is forfeited. No excuse at all.

Q. Did County Judge Lyman also have a practice of always having the defendant present at the time of sentence? Or withdrawal of plea?

A. Yes. I have never seen Judge Lyman fail to forfeit bail when defendant is not present?

Q. From that practice, the fact that bail was not forfeited, and the practice of Judge Lyman, can you state, with reasonable certainty, that Julius Fuller was in Court when the plea was withdrawn?

A. I state he was in Court when the plea was withdrawn.

COURT: This is all of your own recollection?

A. Yes.

COURT: You may cross-examine Mr. Blatt.

FULLER: I don't know if I can cross-examine.

court: You may ask him any question relating to that day.

CROSS-EXAMINATION BY FULLER:

Q. Mr. Blatt, I don't mean this discourteously, when do you first remember seeing Julius Fuller, the relator here?

A. The first day he was on for trial.

Q. You remember this as the first time?

A. You mean in Court? The first time was the Station House, 41st Precinct, after Harry Walter had taken statements.

Q. Did you speak to defendant that night?

A. I believe I did.

Q. Isn't it true you took a statement?

A. Mr. Walter took the first statement -- I took the second.

Q. Did you have a secretary?

A. I had a stenographer.

Q. Do you have the record?

A. Not with me.

Q. Would they be available to the Court?

A. Yes, if necessary.

Q. How long did you talk to the defendant on December 28th?

A. About twenty minutes to half an hour before taking the statement. The statement took about ten minutes to take.

Q. How long did it take to prepare the statement?

A. Half an hour.

Q. Do you remember your stenographer stating it took a long time?

A. I don't remember -- it may have taken longer.

Q. Did the defendant have counsel?

A. Not at that time.

Q. Did you inform him he was entitled to counsel?

A. I don't know -- you hadn't been indicted -- you didn't say you wanted a lawyer.

Q. Did you ask me?

A. No.

Objection by Mr. Elder.

COURT: I don't think it is material.

Q. Mr. Blatt, on December 7th, you talked to defendant in the hallway in Court?

A. At that time I spoke to you.

Q. How many meetings?

A. In the morning and then when we were in the Courtroom -- that is when Greenfeld and I approached the Bench.

Q. Was Mr. Greenfeld present at this conversation?

A. Yes. It must have been Siegel who spoke to the Judge. I knew nothing about it. I refused to make a recommendation. I said if there was a withdrawal of plea, I would try this case if it was tried.

Q. You and Mr. Greenfeld held a conversation at the Bench?

A. Yes.

Q. If there is a conversation at the Bench, isn't it customary that the defendant would be right there?

A. No - we approached the Bench to speak to the Judge.

Q. I don't know how to cross-examine the witness. I am sure your Honor knows the Law on this. I am lost -- I can't cross-examine Mr. Blatt.

A. May I say this -- I personally took it upon myself to contact Greenfeld and I told him I would never allow his client to withdraw

Q. Mr. Blatt, are you saying that Mr. Greenfeld was my counsel?

A. Counsel for Siegel -- he was your counsel -- he appeared in Court for you.

Q. Was it pre-arranged that the plea was to be withdrawn?

A. You were on for sentence that day and when you refused to accept sentence that was the only reason we allowed that the plea was withdrawn. That was the only reason.

COURT: Have you any more questions of Mr. Blatt?

FULLER: No.

Mr. Elder: Do you recall the name of the Court Reporter who attended Judge Lyman on December 7, 1954?

A. Yes- Charlie DeSantis. I spoke to him after I received your letter - he stated on a plea he didn't show appearance of defendant but there is no question about the defendant not being there.

Mr. Elder: You have also in the past ten days spoken to Aaron Greenfeld -- what is his recollection as to .whether Mr. Fuller was present in Court?

A. He said he had no definite recollection, but so far as his procedure, he would never withdraw a plea unless the defendant were present.

Mr. Elder: You said you talked to him four days ago?

A. Yes.

Mr. Elder: At that time did Mr. Greenfeld say whether anyone had contacted him on behalf of Fuller?

A. No - he said I was the first one who contacted him.

Mr. Elder: Since that conversation you have not heard from his since?

A. Mr. Greenfeld? No.

COURT: Do you have anything more you wish to put in the record?

FULLER: No. As to December 7th I was standing in the corridor -- there was no conversation with Mr. Greenfeld, Mr. Blatt and me. As to the conversation between counselor and the District Attorney, I have never had a conversation with Mr. Blatt in the presence of Mr. Siegel or Mr. Greenfeld - in the presence of Mr. Blatt. To get together - I don't know anything about the agreement. I never knew about it until ,I read this. I never talked to anyone. This is the truth. I don't know anything more I can say.

Mr. Elder: On December 7, 1954, you were not aware of the fact that the plea was to be changed from assault, third degree, to a plea of manslaughter, first degree?

Fuller: No.

Mr. Elder: When did you first become aware that your plea had been reinstated as not guilty to manslaughter, first degree -- about how long after December 7th?

Fuller: I learned that morning while I was waiting in the corridor.

Mr. Elder: Were you out on bail?

Fuller: Yes.

Mr. Elder: Did you talk to Mr. Siegel after that? That day?

Fuller: Yes.

Mr. Elder: What did you say to Mr. Siegel about finding yourself being charged with manslaughter, first degree?

Fuller: I don't remember if it was the same day ----

Mr. Elder: Did you ask him to go back in Court and ask to be allowed to reinstate your plea to assault, third degree --- were you particularly displeased that you were again charged with manslaughter, first degree, after learning that your assault plea was withdrawn?

Fuller: I had no reason to be -- Siegel was taking care of the case.

Mr. Elder: You were tried again on the manslaughter charge -- that Jury also disagreed?

Fuller: Yes.

Mr. Elder: That trial was prosecuted by Mr. Blatt?

Fuller: Yes.

Mr. Elder: Subsequent to that, did you ask your counsel if he would again ask if you could plead to assault, third degree, to dispose of the matter?

Fuller: I have never informed counsel how to handle it any way -- no.

Mr. Elder: Then you went to trial on three occasions and you were convicted of manslaughter, first degree?

Fuller: Yes, sir.

Mr. Elder: Throughout the whole history of this case, including two subsequent trials of manslaughter, first degree, after withdrawal of the plea of assault, first degree, or to be fair, after somebody had withdrawn the plea, you never were sufficiently displeased or concerned to ask Siegel, or Mr. Blatt, or the Judge, to let you reinstate your plea of guilty to a misdemeanor?

Fuller: No -- I never did.

Mr. Elder: Now, as a matter of fact, after the second ~~ax~~ disagreement of the jury, isn't it a fact that Mr. Blatt offered to permit Siegel to have you plead to assault?

Fuller: I don't know what he told Mr. Siegel?

Mr. Elder: Did Mr. Siegel ever tell you that Mr. Blatt had made that offer to him?

Fuller: No.

Mr. Elder: Mr. Blatt -- as a matter of fact after the second trial ended in a disagreement, did you speak to Mr. Siegel about a plea to assault in this matter?

Mr. Blatt: Yes -- I again offered to Siegel a plea to assault, third degree, and he said his client would not agree.

Fuller: You asked Greenfeld about that?

Mr. Blatt: Mr. Siegel told me you refused to take the plea to assault -- he would have like to dispose of it that way.

EVIDENCE CLOSED.

Court: I will reserve decision. I want to get a look at the evidence. I will hand down my decision later.

I DO HEREBY CERTIFY THAT THE FORECOING IS A TRUE TRANSCRIPT, TO THE BEST OF MY ABILITY OF THE MINUTES TAKEN BY ME AT THE HEARINGS HELD IN THIS MATTER ON JANUARY 10, 1963 and JANUARY 24, 1963.

Dorothy Charlotte

Special County Court Stenographer

At a Special Term of the County Court of Cayuga County, held at the Court House in the City of Auburn, New York, on the 10th day of January, 1

Present: Hon. Gerald S. Hewitt,
Cayuga County Judge.

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STATE OF NEW YORK

COUNTY COURT CAYUGA COUNTY

- - - - - - - - - - - - - - - - -

THE PEOPLE OF THE STATE OF NEW YORK,
ex rel., JULIUS FULLER,

Relator,

vs.,

ROBERT E. MURPHY, Warden of Auburn
State Prison, Auburn, N. Y.,

Respondent.

- - - - - - - - - - - - - - - - -

Upon reading and filing the writ of habeas corpus heretofore allowed by the Hon. Gerald S. Hewitt, Cayuga County Judge, and made returnable before a Special Term of the County Court, held at the Court House in the City of Auburn, New York, on the 10th day of January, 1963 at 10:00 o'clock in the morning thereof, and the body of the relator having been produced before the Court at the time directed, and Louis J. Lefkowitz, Attorney General of the State of New York (William S. Elder, Jr. of Counsel) appearing in behalf of the respondent, and the matter having been adjourned to January 24th, 1963 at 2:30 P.M., in the afternoon thereof, and the relator having submitted his proof in open court, and the court having reserved decision, and due deliberation having been had, and the court having made and filed its decision dated March 4, 1963, it is

ORDERED that the within writ be and the same hereby is dismissed and the relator remanded to the custody of the Warden of Auburn State Prison.

ENTER.

Gerald S. Hewitt
Cayuga County Judge

STATE OF NEW YORK

COUNTY COURT COUNTY OF CAYUGA

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* * * * * *

THE PEOPLE OF THE STATE OF NEW YORK,

ex rel., JULIUS FULLER, Relator,

- vs -

ROBERT E. MURPHY, Warden of Auburn State Prison, Auburn, New York, Respondent.

* * * * * *

In his petition for a writ of habeas corpus, relator contends that on December 7, 1954, in the Bronx County Court, his plea of guilty to the crime of assault, third degree, was withdrawn by counsel and a plea of not guilty to the crime of manslaughter, first degree, was reinstated by the Court upon motion of counsel and agreement thereto by the District Attorney of Bronx County.

It would appear that prior to this date, relator had been indicted for the crime of manslaughter, first degree, and a trial resulted in a disagreement of the Jury.

Prior to arrangements for a new trial, the defendant (relator) was permitted to plead guilty to the misdemeanor of assault, third degree, in full satisfaction of the indictment. The date for sentence was set for December 7, 1954. At this point, the testimony varies sharply. The defendant (relator) contends that he was not consulted with reference to the withdrawal of this plea and the reinstatement of the not guilty plea and that he was not in Court at the time of the proceeding with reference to the same. Defendant (relator) further denies that he ever had a conversation with a representative of the District Attorney's office in the presence of his counsel.

Mr. Blatt (Assistant District Attorney) appeared in this Court and testified not only that he had talked to the relator in the presence of Mr. Siegal, his counsel, but that on the occasion of this conversation Mr. Siegal had offered to plead the relator guilty to assault, third degree, if a suspended sen-

tence could be obtained by the Court. Mr. Blatt refused to make any recommendation whatsoever but did agree to accept the plea with the provision that if a suspended sentence were not forthcoming that the defendant (relator) would be allowed to withdraw such plea of guilty to assault, third degree, and it was on the basis of this conversation that the plea was originally entered.

On December 7, 1954, and before the opening of Court, Mr. Blatt also conferred with the defendant (relator) and counsel, Mr. Aaron Greenfeld, and pointed out to him the fact that he could receive a very severe prison sentence if he were found guilty of the crime of manslaughter, first degree, and urged him not to withdraw his plea of guilty to assault, third degree. Mr. Blatt also testified that it was his practice never to accept a plea or to take any action on a case in Court unless the defendant were actually present. Furthermore, Mr. Blatt emphatically stated that on the day set for sentence, the defendant must personally appear or bail would be forfeited. It is also the invariable practice of the Court to require the presence of the defendant on the date set for sentence and on his failure to appear, bail is immediately forfeited. In this case there was no forfeiture of bail.

Mr. Blatt, by his own recollection, as well as his knowledge of the custom of the Court, was able to testify that the defendant (relator) was present at all stages of the proceeding and was actually physically in Court at the time the motion was made to withdraw the plea to assault, third degree. This witness is an attorney at Law with nearly twenty-five years experience at the Bar, with a very high reputation of personal integrity.

In view of the weight which must be accorded the testimony of this witness and in further view of the practice and custom of the Court in the present trial of fact, it must be held that the relator has failed to sustain the burden of proof. Accordingly, the writ must be dismissed. Prepare order.

s/ Gerald S. Hewitt
Judge of County Court

Dated: March 4, 1963

At a term of the County Court of Bronx County held in and for the County of Bronx, in the Court House in the Borough of Bronx, City of New York, on the 8th day of November in the year of our Lord one thousand nine hundred and fifty-six.

Present:

Hon. Eugene G. Schulz

County Judge

- - - - - - - - - - - - - - - -

THE PEOPLE OF THE STATE OF NEW YORK

AGAINST

JULIUS FULLER

- - - - - - - - - - - - - - - -

Date of Crime December 26, 195 Indicted for Manslaughter First Degree and convicted of Manslaughter First Degree by the verdict of a jury, having never been heretofore convicted of a felony.

Whereupon it is ORDERED and ADJUDGED by the Court, that the said Julius Fuller for the felony aforesaid whereof he is convicted, be imprisoned in the STATE PRISON AT SING SING at hard labor, under and INDETERMINATE SENTENCE, the maximum of such imprisonment to be twenty (20) years and . . . months, and the minimum thereof ten (10) years and . . . months. It is directed that the defendant, Julius Fuller, remain at Bronx City Prison until November 15, 1956.

A true extract from the Minutes.

John J. Hanley

Clerk

I HEREBY CERTIFY that the defendant within named was examined under oath by the Court before Judgment was pronounced, and he states as follows:

His true name is Julius Fuller; his age is 33 years; he is married; was born in United States, his mother is living; resided at time of arrest at 1350 Lyman Place, Bronx, has never been convicted of a felony before; his occupation has been baker, he can read and write.

John J. Hanley

Clerk

(102 days jail time allowed)

(Exhibit "D")

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Indictment No. 40-1954

COUNTY COURT : BRONX COUNTY

- - - - - - - - - - - - - - -

THE PEOPLE OF THE STATE OF NEW YORK

against

Withdrawal of Plea

JULIUS FULLER,

Defendant

- - - - - - - - - - - - - - -

(Assault 3rd Degree)

New York, December 7, 1954

Before:

HON. WILLIAM LYMAN,

County Judge.

Appearances:

For the People:

GEORGE B. DELUCA, ESQ.
District Attorney, Bronx County.
BY DAVID S. BLATT, Esq.
Assistant District Attorney

For the Defendant:

HERBERT S. SIEGAL, Esq.
by AARON GREENFIELD, Esq., of counsel.

Charles J. DeSantis
Official Court Reporter

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MR. GREENFELD: If your Honor pleases, the defendant desires to withdraw his plea of guilty heretofore entered and desires to enter a plea of not guilty.

MR. BLATT: May we have - - The People consent to the withdrawal of the plea as per the understanding of on the date of taking the plea. Your Honor, may we have a definite date for trial?

THE COURT: Yes, set it down for trial. What date do you want?

MR. GREENFELD: You better set it after the first of the year.

MR. BLATT: The first wek in January.

THE COURT: What date? January 3rd or 4th?

MR. BLATT: Any date satisfactory to the Court.

THE COURT: January 5th. That is a Wednesday, the first Wednesday in January. Is that satisfactory?

MR. GREENFELD: Satisfactory.

MR. BLATT: I think we better put it on for a Monday.

THE COURT: The 3rd.

MR. BLATT: That will be the first day, your Honor, and will counsel for the defendant please be notified to be ready on that date so that we can go to trial, your Honor?

THE COURT: Will you advise trial Counsel to be prepare to go to trial then?

MR. GREENFIELD: Right.

THE COURT: January 3rd. The plea is withdrawn on consent of the District Attorney. The plea of not guilty is reinstated. Set for trial on January 3rd. Any objection to continuing bail?

MR. BLATT: No objection.

THE COURT: Bail is continued. January 3rd for trial.

MR. GREENFELD: Thank you, your Honor.

THE COURT: Plea withdrawn.

- 0 -

This is to certify that the foregoing is a true and accurate transcript of the minutes.

Charles J. DeSantis
Official Court Reporter

Indictment No. 40/1954

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FILED

OCT 27 1954

COUNTY COURT CLERK'S OFFICE
BRONX COUNTY

COUNTY COURT - BRONX COUNTY

- - - - - - - - - - - - - - - - -

THE PEOPLE OF THE STATE OF NEW YORK :

- against - :

(Plea)

JULIUS FULLER, :

Defendant. :

- -X

(On indictment for Manslaughter-1st Deg.)

New York, October 21, 1954.

B E F O R E:

HON. WILLIAM LYMAN,

County Judge.

- - -

Appearances:

For the People:

GEORGE B. DeLUCA, ESQ.,
District Attorney, Bronx County.
By DAVID S. BLATT, ESQ.,
Assistant District Attorney.

For the Defendant:

HERBERT S. SIEGAL, ESQ.

- - -

Irving Netzer,
Official Court Reporter.

(Conference at the bench between the Court and both counsel).

MR. SIEGAL: If Your Honor please, the defendant desires to withdraw his plea of not guilty heretofore entered to the indictment of manslaughter in the first degree, and at this time plead guilty to the crime of assault in the third degree, a misdemeanor, to cover all counts of the indictment.

MR. BLATT: The People recommend the acceptance of that plea, Your Honor.

If Your Honor recalls, this case was tried for about a week and a half in front of Your Honor in April of this year. At the termination of the trial the jury was unable to reach a verdict and there was a disagreement.

The facts on which this defendant was tried are that on December 26, 1953, at about 8:00 or 8:30 P. M., at apartment 3-G at 866 Stebbins Avenue, this defendant is alleged to have stabbed to death one Elise Johnson.

As I say, the jury disagreed as to whether or not this defendant had stabbed her. However, I don't think there is any doubt that he did assault her in

some manner.

In view of those facts I recommend the acceptance of the plea to assault in the third degree.

THE COURT: Julius Fuller, do you now desire to withdraw your plea of not guilty to the indictment, and do you desire to plead guilty to the crime of assault in the third degree?

THE DEFENDANT: I do.

THE COURT: Did you, on December 26, 1953, at 866 Stebbins Avenue, assault one Elise Johnson?

THE DEFENDANT: Yes.

THE COURT: Are you guilty of this charge?

THE DEFENDANT: Yes.

THE COURT: The Court accepts the plea.

(Defendant sworn and pedigree recorded by the clerk of the court, the defendant standing mute as to prior convictions).

THE COURT: December 7th for sentence. Is that satisfactory?

MR. SIEGAL: That will be satisfactory. Will Your Honor continue bail until the date of sentence?

MR. BLATT: No objection.

THE COURT: On consent of the District Attorney the bail is continued.

Go down to the Probation Department now, Room 101.

- - -

This is to certify that the foregoing is a true and accurate transcript of the minutes.

IRVING NETZER
Official Court Reporter

COUNTY COURT : BRONX COUNTY

(Exhibit "C")

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THE PEOPLE OF THE STATE OF NEW YORK

-against-

Indictment No.

JULIUS FULLER,

40/1954

Defendant.

Pursuant to the provisions of Section 342a of the Code of Criminal Procedure, the District Attorney herein submits to the Court a statement in writ setting forth his reasons for recommending the acceptance of a plea to a lesser degree of crime than that charged in the first count on the indictment.

This defendant was indicted by the Grand Jury of Bronx County for the crime of Manslaughter in the First Degree on the 8th day of January, 1954, th facts briefly are as follows:

Some time after 1 A.M. on December 27, 1953, Elise Johnson, a negro 39 years of age, was found dead in her apartment, at apartment 3-G at 866 Stebbin Avenue.

The defendant had been drinking with the deceased and another couple in the 845 Club at 845 Prospect Avenue. They proceeded to the deceased's home. They had a drink and after the other couple left, an argument ensued between the defendant and the deceased.

It was the contention of the People on the trial which commenced on Apri 26, 1954, and lasted through May 11, 1954, that the defendant hit the deceased with a four foot iron bar on the right side of the head and thus caused her death.

However, the jury disagreed and it was later discovered stood eleven to one for acquittal.

In view of the disagreement and in further view of the undersigned, after having discussed the case with the court, it is the opinion of the undersigned that it would be difficult to obtain a conviction in this case.

In view of the above, it is respectfully recommended to this court that this defendant be allowed to plead guilty to Assault in the Third Degree.

Filed Nov. 8 - 1954
County Court Clerk's Office
Bronx County

Respectfully submitted
DAVID S. ADLER
Assistant District Attorney